

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Consumer & Governmental Affairs Bureau	)	CG Docket No. 02-278
Seeks Comment on Petition for	)	
Expedited Declaratory Ruling from	)	
SoundBite Communications, Inc.	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF THE FUTURE OF PRIVACY FORUM**

The Future of Privacy Forum (“FPF”) submits these comments in response to the Consumer and Governmental Affairs Bureau’s March 30, 2012 Public Notice in the above-captioned proceeding,<sup>1</sup> which seeks comment on a Petition for Expedited Declaratory Ruling filed by SoundBite Communications, Inc. (“SoundBite”).<sup>2</sup> SoundBite requests that the Federal Communications Commission (“Commission”) clarify that sending a single text message confirming a subscriber’s request to “opt-out” of receiving additional text messages in the future is not a violation of the Telephone Consumer Protection Act (“TCPA”)<sup>3</sup> or the Commission’s TCPA rules.<sup>4</sup>

One-time opt-out confirmation text messages help protect individual privacy – one of the primary goals of the TCPA. Sending these messages is also a widely adopted industry best

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc.*, CG Docket No. 02-278, Public Notice, DA 12-511 (rel. Mar. 30, 2012) (“Notice”).

<sup>2</sup> *See SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“Petition”).

<sup>3</sup> 47 U.S.C. § 227.

<sup>4</sup> *See* 47 C.F.R. § 64.1200 *et seq.*

practice that benefits consumers and does not run afoul of the TCPA's restriction on "autodialed" calls and messages to wireless telephone numbers. Therefore, the Commission should grant the Petition.

**About the Future of Privacy Forum.** FPF is a Washington, DC-based think tank focused on advancing responsible data practices. FPF is led by privacy leaders Jules Polonetsky and Christopher Wolf and includes an advisory board comprised of leading figures from industry, academia, law and advocacy groups.<sup>5</sup>

FPF seeks to advance meaningful self-regulation and best practices for consumer privacy and has significant experience in working with stakeholders to address mobile privacy issues. For example, on April 25, 2012, FPF co-hosted the App Developer Privacy Summit along with the Application Developers Alliance and the Stanford Center for Information and Society.<sup>6</sup> In addition, FPF regularly conducts surveys of app privacy policies. FPF hopes that its expertise in this area will make these comments useful to the Commission.

**The opt-out confirmation text messages advance the TCPA's goal of protecting individual privacy.** One of Congress's main objectives in passing the TCPA was to protect consumers against invasions of privacy. As the Commission has recognized, "by enacting the TCPA and its prohibitions on unwanted calls, Congress has . . . made an assessment that the benefits of protecting consumer privacy are substantial."<sup>7</sup> Congress found that certain telephone calls had become "a nuisance and an invasion of privacy" and that "individuals' privacy rights,

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<sup>5</sup> The positions taken by FPF are entirely its own and do not necessarily reflect those of its supporters and advisory board members.

<sup>6</sup> See *App Developer Privacy Summit*, <http://cyberlaw.stanford.edu/events/app-developer-privacy-summit>.

<sup>7</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 ¶ 19 (rel. Feb. 15, 2012) ("*Robocall Report and Order*").

public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices.”<sup>8</sup>

One-time, opt-out confirmation text messages help protect individual privacy. As SoundBite explains in the Petition, after a subscriber submits an opt-out request, SoundBite receives and processes the request by placing the subscriber’s number on a type of “do not text” list.<sup>9</sup> The SoundBite software then sends a confirmation text message to the subscriber letting him or her know that the opt-out request has been honored. This practice respects subscribers’ choice to opt-out and, by providing a formal record of the opt-out, helps ensure that no future text messages are sent to such subscribers (unless they provide consent again).

SoundBite’s opt-out confirmation messages can also help prevent invasions of privacy and identity theft stemming from the use of wireless telephones. For example, they help companies verify that the individual requesting the opt-out is in fact the subscriber. A subscriber that had not requested to opt out would find the confirmation message to be very strange, prompting further inquiry. The messages also provide a record of opt-out activity in case a subscriber temporarily loses physical control over the phone.

Moreover, as the Commission recognized in its recent *Robocall Report and Order*, wireless subscribers now rely on many “highly desirable” services that provide informational messages.<sup>10</sup> Examples include payment reminders, fraud alerts, account updates, and other services that protect user privacy and prevent identity theft. Opt-out confirmations support these

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<sup>8</sup> See *id.* ¶ 24, citing 137 Cong. Rec. H11307 (Daily Ed. Nov. 26, 1991); see also S. Rep. No. 102-178, 5, reprinted in 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”).

<sup>9</sup> Petition at 6.

<sup>10</sup> *Robocall Report and Order* ¶ 29.

services by ensuring that consumers do not inadvertently opt out of a service and fail to see critical information.

**The confirmation messages are also consistent with industry best practices.** Wireless industry best practices require parties to send a confirmation text message after honoring a subscriber's opt-out request.<sup>11</sup> The Mobile Marketing Association ("MMA") and all major U.S. wireless carriers require companies to provide opt-out confirmation messages, consistent with the MMA U.S. Consumer Best Practices.<sup>12</sup> Pursuant to the Consumer Best Practices, if a subscriber requests to opt out of future text messages, the provider "must respond" with a mobile terminating message.<sup>13</sup> This pro-consumer practice has been widely adopted by both carriers and by companies that send text messages.

**The confirmation messages are not prohibited by the TCPA.** The TCPA prohibits the delivery of "autodialed" calls and text messages to wireless telephone numbers absent an emergency or the "prior express consent" of the called party.<sup>14</sup> As explained in the Petition, SoundBite's system is not an "autodialer" because it does not have the capacity to generate and dial random or sequential numbers.<sup>15</sup> In addition, opt-out confirmation text messages are sent

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<sup>11</sup> See Petition at 7-8.

<sup>12</sup> See Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0 § 1.6-4 (Mar. 1, 2011) ("Consumer Best Practices"), *available at* [mmaglobal.com/bestpractices.pdf](http://mmaglobal.com/bestpractices.pdf); *see also* § 2.7-12 (providing for opt-out confirmation messages for premium rate programs).

<sup>13</sup> *Id.*

<sup>14</sup> See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003) (concluding that the restriction applies to both voice calls and text messages). The Commission recently adopted a requirement that callers must obtain prior express written consent for autodialed or prerecorded telemarketing calls and messages. *See Robocall Report and Order*.

<sup>15</sup> Petition at 5-7.

with the “prior express consent” of the called party. The subscriber’s consent to receive such messages remains intact until the opt-out request has been processed and confirmed.

**Conclusion.** For the foregoing reasons, the Commission should grant the SoundBite Petition and confirm that parties may send a single opt-out confirmation text message without violating the TCPA.

Respectfully submitted,

*/s/ Jules Polonetsky*

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